87-1546

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN MELCHER, MEMBER, UNITED STATES SENATE,
Petitioner

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Senator John Melcher brought suit seeking redress of an injury to his executive power under Article II, § 2, cl. 2, to participate in the selection of officers of the United States.

His injury arises from the circumstance that of the twelve members of the Federal Open Market Committee, five are appointed in accordance with a statute which makes no provision for the advice and consent of the Senate as to those appointments.

The court of appeals held that because Congress has power under Article I to enact remedial legislation, the doctrine of equitable discretion requires dismissal of the suit.

The question presented is whether the suit is justiciable.

LIST OF PARTIES IN THE COURT OF APPEALS

In the Court of Appeals for the District of Columbia Circuit, Senator John Melcher of Montana was the appellant. The appellees were the Federal Open Market Committee and those of its members and alternate members elected by the boards of directors of Federal Reserve banks in accordance with section 12A of the Federal Reserve Act (12 U.S.C. § 263).*

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* In addition to the lead defendant Federal Open Market Committee, Senator Melcher's complaint named as defendants Anthony M. Solomon, Edward G. Bohne, Karen N. Horn, E. Gerald Corrigan, and Robert H. Boykin, identifying them as members of the Federal Open Market Committee, and named as defendants Thomas M. Timlen, Robert P. Black, Silas Keehn, John J. Balles, and Robert P. Forrestal, identifying them as alternate members.

All defendants were represented by the Department of Justice. In view of their contention, on which there is now no unvacated judicial ruling at any level, that the named individuals were simply private individuals selected by the Reserve banks, the status of some of them as parties to the proceeding in the Court of Appeals is not clear, but the question does not seem to have any practical significance. If Senator Melcher obtains an injunction against the Federal Open Market Committee, it will afford him the relief he seeks regardless of the identity or status of the other defendants; if the defendants prevail, the issue of who (other than the FOMC) appeared and how will likewise be moot.

If the individuals named as defendants in the complaint and listed in the first paragraph of this note were not public officers within the meaning of Rule 25(d) of the Federal Rules of Civil Procedure and Rule 43(c) of the Federal Rules of Appellate Procedure, then they were the only parties appearing as appellees in the Court of Appeals.

If, however, the individuals named in the complaint as defendants were public officers within the meaning of the rules cited, then by the operation of those rules the following persons, in addition to the FOMC itself, were parties to the litigation as appellees during the periods indicated with respect to each:

(1) Elected by the boards of directors of the Federal Reserve Banks of Boston, Philadelphia, and Richmond and serving during the period—

(a) from November 20, 1986 (date of filing in the District Court for the District of Columbia of notice of appeal to the Court of Appeals for the District of Columbia Circuit) to February 28, 1987 (end of their terms), Frank E. Morris as a member of the Federal Open Market Committee, and Edward G. Boehne as an alternate member;

(b) from March 1, 1987 (beginning of their terms) to February 29, 1988 (end of their terms), Edward G. Boehne as a member, and Robert P. Black as an alternate; and

(c) from March 1, 1988, to the date of filing of this petition, Robert P. Black as a member, and Frank E. Morris as an alternate.

(2) Elected by the board of directors of the Federal Reserve Bank of New York, and serving throughout the period when the court of appeals had jurisdiction of the case: E. Gerald Corrigan as a member, and Thomas M. Timlen as an alternate.

(3) Elected by the boards of directors of the Federal Reserve Banks of Cleveland and Chicago and serving during the period—

(a) from November 20, 1986 to February 28, 1987, Karen N. Horn as a member, and Silas Keehn as an alternate; and

(b)(i) from March 1, 1987 to February 29, 1988, Silas Keehn as a member; and

(ii) from March 1, 1987 to April 8, 1987 (effective date of her resignation), Karen N. Horn as an alternate; and during the period from October 8, 1987 (effective date of his election) to February 29, 1988, W. Lee Hoskins as an alternate; and

(c) from March 1, 1988, to the date of filing of this petition, W. Lee Hoskins as a member, and Silas Keehn as an alternate.

(4) Elected by the boards of directors of the Federal Reserve Banks of Atlanta, Dallas, and St. Louis, and serving during the period—

(a) from November 20, 1986 to February 28, 1987, Thomas C. Melzer as a member, and Robert H. Boykin as an alternate;

(b) from March 1, 1987 to February 29, 1988, Robert H. Boykin as a member, and Robert P. Forrestall as an alternate; and

(c) from March 1, 1988, to the date of filing of this petition, Robert P. Forrestal as a member, and Thomas C. Melzer as an alternate.

(5) Elected by the boards of directors of the Federal Reserve Banks of Minneapolis, Kansas City, and San Francisco, and serving during the period—

(a) from November 20, 1986 to February 28, 1987, Roger Guffey as a member, and Gary H. Stern as an alternate;

(b) from March 1, 1987 to February 8, 1988, Gary H. Stern as a member, and Robert T. Parry as an alternate; and

(c) from March 1, 1988, to the date of filing of this petition, Robert T. Parry as a member, and Roger Guffey as an alternate.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John Melcher, Member, United States Senate, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 836 F.2d 561. The opinions of the district court (Harold H. Greene, D.J.) on the issue of justiciability (App. B, *infra*, 15a-26a) and on the merits (App. B, *infra*, 33a-47a) are reported at 644 F. Supp. 510. The other memorandums, opinions, and orders of the district court in this case are not reported. They are briefly but separately described in the Statement of the

Case (*infra*, 4-11), and are included in Appendix B, *infra*. The memorandum opinion of the court of appeals denying the petition of the defendants (respondents herein) for a writ of mandamus (App. B, *infra*, 32a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 50a) was entered on December 18, 1987. On March 4, 1988, the court of appeals entered orders denying Senator Melcher's petition for rehearing and suggestion of rehearing *en banc* (App. C, *infra*, 52a and 53a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Art. II, § 2, cl. 2, of the Constitution, and sections 4 and 12A of the Federal Reserve Act (12 U.S.C. §§ 341 and 263). These provisions are as follows:

CONSTITUTION OF THE UNITED STATES
ARTICLE. II.

* * * *

SECTION 2. . . . .

He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the Courts of Law, or in the Heads of Departments.

THE FEDERAL RESERVE ACT

* * * *

FEDERAL RESERVE BANKS

SEC. 4. * * * *

* * * The president shall be the chief executive officer of the bank and shall be appointed by the board of directors, with the approval of the Board of Governors of the Federal Reserve System, for a term of five years; and all other executive officers and all employees of the bank shall be directly responsible to him. The first vice president of the bank shall be appointed in the same manner and for the same term as the president, and shall, in the absence or disability of the president or during a vacancy in the office of the president, serve as chief executive officer of the bank. . . . .
(49 Stat. 703; 12 U.S.C. § 341.)

* * * *

FEDERAL OPEN MARKET COMMITTEE

SEC. 12A. (a) There is hereby created a Federal Open Market Committee (hereinafter referred to as the "Committee"), which shall consist of the members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks to be selected as hereinafter provided. Such representatives shall be presidents or first vice presidents of Federal Reserve banks and, beginning with the election for the term commencing March 1, 1943, shall be elected annually as follows: One by the board of directors of the Federal Reserve Bank of New York, one by the boards of directors of the Federal Reserve Banks of Boston, Philadelphia, and Richmond, one by the boards of directors of the Federal Reserve Banks of Cleveland and Chicago, one by the boards of directors of the Federal Reserve Banks of Atlanta, Dallas, and St. Louis, and

one by the boards of directors of the Federal Reserve Banks of Minneapolis, Kansas City, and San Francisco. In such elections each board of directors shall have one vote; and the details of such elections may be governed by regulations prescribed by the committee, which may be amended from time to time. An alternate to serve in the absence of each such representative shall likewise be a president or first vice president of the Federal Reserve bank and shall be elected annually in the same manner. The meetings of said committee shall be held at Washington, District of Columbia, at least four times each year upon the call of the Chairman of the Board of Governors of the Federal Reserve System or at the request of any three members of the Committee.

(b) No Federal Reserve bank shall engage or decline to engage in open-market operations under section 14 of this Act except in accordance with the direction and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.

(c) The time, character, and volume of all purchases and sales of paper described in section 14 of this Act as eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.
(49 Stat. 705, as amended, 56 Stat. 647; 12 U.S.C. § 263.)

STATEMENT OF THE CASE

Introduction

The Board of Governors of the Federal Reserve System has described the dominant role of the Federal Open Market Committee in the critically important function of determining the monetary policy of the United States Government as follows:

> The Federal Open Market Committee (FOMC) is the most important monetary policy-making body of the Federal Reserve System. It is responsible for the formulation of a policy designed to promote economic growth, full employment, stable prices, and a sustainable pattern of international trade and payments. The FOMC makes key decisions regarding the conduct of open market operations—purchases and sales of U.S. Government and Federal Agency securities—which affect the provision of reserves to depository institutions and, in turn, the cost and availability of money and credit in the U.S. economy. The FOMC also directs System operations in foreign currencies.[1]

The FOMC has issued a number of regulations relating to open market operations of Federal Reserve banks, the availability of information, and rules of procedure, as well as statements of policy. These are currently published as §§ 270.1 to 281.2 of title 12 of the Code of Federal Regulations. In 12 CFR § 281.2, the FOMC describes its independence of the Board of Governors:

> The Federal Open Market Committee ("FOMC") is a separate and independent statutory body within the Federal Reserve System. In no respect is it an agent or "subdivision" of the Board of Governors of the Federal Reserve System . . . .

The five members of the FOMC whose powers are at issue in this litigation are elected for one-year terms by the boards of directors[2] of the twelve regional Federal

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[1] Undated pamphlet entitled "The Federal Open Market Committee," published and distributed by the Board of Governors of the Federal Reserve System.

[2] Each Federal Reserve bank serves a geographically-defined district and has a board of directors consisting of nine persons, of whom six are elected by those commercial banks within its district which are members of the Federal Reserve System, and the other three of whom are appointed by the Board of Governors of the Federal Reserve System.

Reserve banks from among the 24 persons who, at any given time, are the presidents and first vice presidents of such banks. There is no power in the Board of Governors or any other agency or officer of the United States to determine who, among those eligible, will be elected to the FOMC. For each elective member, an alternate to serve in his absence is also elected in the same way from the same pool of eligible bank officers.[3]

The Federal Reserve banks are banking corporations chartered by the Comptroller of the Currency under authority of the first three paragraphs of section 4 of the Federal Reserve Act (38 Stat. 254; not in U.S. Code). Section 4 of the Act (12 U.S.C. § 341) also provides that the president and first vice president of each Federal Reserve bank shall be appointed by its board of directors, with the approval of the Board of Governors, for a term of five years.

The Relief Sought

Senator Melcher filed an action seeking an injunction which would permit the FOMC, as an agency, to continue to function without interruption and without diminution of its jurisdiction or authority. He does not challenge the procedure for the election of the Reserve bank representatives, nor does he seek their removal. He contends, however, that their exercise of the power to vote or act as chairman of the Committee deprives him of his *own* constitutional role in the appointment process, because when they exercise such power, then under *Buckley v. Valeo*, 424 U.S. 1, 125 (1976), they are acting as officers of the United States for whose ap-

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[3] Section 12A and 10 of the Federal Reserve Act (12 U.S.C. §§ 263 and 241) provide for the composition of the FOMC and the method of selection of its twelve members. Seven of them serve as a statutorily-prescribed incident to their duties as members of the Board of Governors, to which they are appointed for 14-year terms by the President, subject to Senate confirmation.

pointment the advice and consent of the Senate must be obtained in accordance with Art. II, § 2, cl. 2 of the Constitution.

He has therefore sought to have the Reserve bank representatives enjoined from voting in, or serving as chairman or vice chairman of, the FOMC. The Federal Reserve Act nowhere mentions the voting rights of the members of the FOMC, nor does it provide for a chairman or vice chairman; any statutory authority in respect of these matters is necessarily implied rather than express. In essence, Senator Melcher seeks to have applied in this case the teachings of *Crowell v. Benson*, 285 U.S. 22, 62-63 (1932), that an implication in a statute that would raise a constitutional question should not be indulged, and that the application of this principle is mandatory where, as here, the statute in question contains a severability clause.[4]

Jurisdiction of the District Court

The plaintiff invoked the jurisdiction of the district court on three independent grounds:

> (1) under 28 U.S.C. § 1337, on the ground that the action arose under an act regulating commerce, section 12A of the Federal Reserve Act (12 U.S.C. § 263);
>
> (2) under 28 U.S.C. § 1331(a), on the ground that the action arose under Art. II, § 2 of the Constitution and section 12A of the Federal Reserve Act (12 U.S.C. § 263), and was being brought against an agency of the United States; and
>
> (3) under 5 U.S.C. § 702, on the ground that the plaintiff was suffering legal wrong because of agency action.

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[4] Section 30 of the Federal Reserve Act as originally enacted, 38 Stat. 275, contains a severability clause which, although not included in the United States Code, remains in full force and effect.

History of Litigation

Senator Melcher's action was filed on April 30, 1984. On June 29, 1984, the defendants filed a motion to dismiss "for failure to state a claim upon which relief can be granted," and argued in their supporting memorandums that the action must be dismissed either in the exercise of "equitable discretion" or on the ground that the plaintiff lacked standing to sue.

On September 28, 1984, while this motion was pending, the district court, *sua sponte*, filed a memorandum order (*infra*, 12a) staying the action pending the decision of the court of appeals in *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*, 766 F.2d 538 (D.C. Cir. 1985). Because the district court relied on *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981), as its ground for the stay, a brief review of *Riegle* as well as *Committee for Monetary Reform* is necessary to an understanding of the context in which the case at bar was decided below.

Senator Riegle's 1979 complaint was very similar to the complaint filed in 1984 by Senator Melcher.[5] In its analysis of the justiciability of Senator Riegle's suit, the court of appeals stated, "we think it reasonable to hold that he was standing," 656 F.2d at 879, and again, unequivocally, at 882, "We hold that Senator Riegle has standing to bring this action . . ."

Notwithstanding that holding, the *Riegle* court went on to decide to "exercise our equitable discretion to dis-

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[5] The first paragraph of the prayer for relief in the *Riegle* complaint demanded the total exclusion of the Reserve bank representatives from the FOMC; the second paragraph, as an alternative, asked that they be enjoined from voting and from serving as chairman or vice chairman. The *Melcher* complaint asked only the latter relief. In all other material respects, the two complaints were identical.

miss the case on the ground that judicial action would improperly interfere with the legislative process," *ibid.* The court chose this rationale after announcing that in determining the justiciability of congressional plaintiff suits, the doctrines of standing, political question, and ripeness were best avoided altogether. *Id.* at 881.

Even though the *Riegle* court stated in so many words that what it called "separation-of-powers concerns" would *not* be raised in a suit for similar relief brought by a private party, it expressly assumed that such concerns would be acutely implicated in *any* suit brought by a Member of Congress, *ibid.* Without giving any explanation or justification for that assumption, the court used it as the foundation for its new rule requiring the dismissal of congressional plaintiff suits in the exercise of "equitable discretion." The court explained the operation of that rule in the following terms, *id.* at 882; the italicization of the word "or" is by the court itself:

> When a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would not likely qualify for standing, the court would be counseled under our standard to hear the case. . . .
>
> In short, our standard would counsel dismissal of congressional plaintiff actions only in cases in which (i) the plaintiff lacks standing under traditional tests, or (ii) the plaintiff has standing but could get legislative redress and a similar action could be brought by a private plaintiff.

Considered in context, these words cannot be fairly read otherwise than as a holding that in the circumstances of the *Riegle* case, the doctrine of equitable discretion is not available as a basis for dismissal in the absence of private plaintiff standing. This appears to have been the view of the *Riegle* panel itself; it is hard to understand any other reason why, in defending the application of its new doctrine in the case before it, the

Riegle panel would have so emphatically asserted the likelihood of private-plaintiff standing:

> In this case, for example, although prudential considerations warrant the dismissal of Senator Riegle's claim, *one can easily conceive of a private plaintiff who could acquire standing to bring a similar claim.* A person with significant economic interests in the open securities markets and prime lending rates, *e.g.*, a major corporation, pension fund, or other major investor, might qualify . . . . [emphasis added]

Riegle, 656 F.2d at 881. As the district court pointed out in the case at bar (*infra*, 23a & n.6), "each of these hypothetical private plaintiffs was an actual plaintiff in *Committee for Monetary Reform*, and all were denied standing."

The *Committee for Monetary Reform* panel did not question this understanding of the *Riegle* rule; rather, it justified the *Committee for Monetary Reform* result by questioning the validity of the assumption used in *Riegle* to apply the rule:

> In *Riegle*, however, no private plaintiff was before the Court, and the decision therefore does not constitute a holding that private plaintiffs have standing in such a case.

Committee for Monetary Reform v. Board of Governors of the Federal Reserve System, 766 F.2d 538 at 544 (D.C. Cir. 1985).

The District Court's Rulings

Accepting at face value the decision of the court of appeals in *Committee for Monetary Reform* to reject one of the predicates for the exercise of what the *Riegle* panel had denominated as a discretionary power, the district court on June 5, 1986, filed an opinion and order denying the defendants' motion to dismiss (*infra*, 15a and 27a). The defendants thereupon moved for certifica-

tion of the question of justiciability for interlocutory appeal. By memorandum and order filed June 10, 1986, the district court denied the motion for certification (*infra*, 28a and 30a).

The defendants then filed a petition for mandamus seeking review of the district court's denial of their motion to dismiss. By an unreported memorandum order entered June 25, 1986, the court of appeals denied the petition for mandamus (*infra*, 32a).

The district court granted the defendants' motion for summary judgment on the merits by an opinion and order filed September 25, 1986 (*infra*, 33a and 48a). By order filed November 18, 1986 (*infra*, 49a), the district court denied the plaintiff's motion to alter or amend judgment, and the plaintiff filed a notice of appeal on November 20, 1986.

The Court of Appeals' Decision

The court of appeals vacated the district court's opinions in regard to both justiciability and the merits, and affirmed the judgment dismissing the action, by an opinion and judgment filed December 18, 1987 (*infra*, 1a and 50a). The opinion did not question the *Riegle* holding that Senators have standing to sue for the injury alleged, but held that it is an abuse of discretion for a district court to fail to dismiss an action brought by a legislator if he "could obtain substantial relief from his fellow legislators through the legislative process." (*infra*, 9a). The decision made no differentiation between legislative powers as such and any other powers or interests which a legislator may possess as an incident to his position, nor did it differentiate between powers and interests derived directly from the Constitution and those arising from other sources, such as statutes or rules. By orders filed March 4, 1988 (*infra*, 52a and 53a), the court denied Senator Melcher's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

A. The District of Columbia Circuit's Doctrine of Equitable Discretion Is in Conflict With Other Circuits and Is Not Supported by Any Decision of This Court

With or without its now-pruned private-plaintiff branch, the equitable discretion doctrine is unique to the District of Columbia Circuit. It is inconsistent with the opinion of this Court in *Marsh v. Chambers*, 463 U.S. 783, 786 & n.4 (1983), expressing approval of the handling of the standing issue in *Chambers v. Marsh*, 675 F.2d 228, 231 & n.5 (8th Cir. 1982). In that case, the plaintiff Chambers, a member of the Nebraska state legislature, claimed injury from the legislature's practice of opening each legislature day with a prayer by a chaplain paid by the state. In note 4 at 786, this Court stated, "[W]e agree that Chambers, as a member of the legislature . . . has standing to assert this claim."

There was no dissent from that view in either this Court or the Eighth Circuit. A finding that a legislator's claim of injury from merely having to listen to a short prayer at the commencement of legislative sessions is justiciable cannot be reconciled with the holding below that a denial of a legislator's ability to exercise one of the textual powers of the office to which his constituents elected him is not justiciable.

Even more directly in point is the conflict with the holding of the Third Circuit, in granting standing to individual senators who claimed injury from the service of an officer whose nomination had not been submitted to the Virgin Islands Senate. If it really wants to do battle with the executive branch, a legislature has all sorts of weapons at its disposal, but in that kind of conflict the principal victim is almost invariably the public. In accepting its responsibility to settle a constitutional controversy arising from the same kind of injury

suffered by Senator Melcher, the court said in *Dennis v. Luis*, 741 F.2d 628 at 633 (3d Cir. 1984)—

> While we respect the thoughtful analysis in the opinion written by Judge Robb in *Riegle*, we are not bound by the articulated doctrine, and we decline at this time to adopt it.

B. The Possible Existence of a "Legislative Remedy" Has No Place in the Analysis of the Justiciability of This Case

It has been argued that precedents allowing standing to members of state legislatures are not applicable to federal legislators because, it is said, the doctrine of separation of powers bars standing in the latter case but not the former.[6] That contention obviously was not persuasive with the Third Circuit—the concept of separation-of-powers permeates the Virgin Islands constitution no less than the Federal—nor will it bear serious analytic scrutiny. The principles of federalism, involving respect for the official acts of the sovereign states, militate just as strongly against hearing the case of an individual state legislator as the principles of separation of powers do against hearing the case of an individual Member of Congress.

In either case, the proper inquiry is not whether remedial legislation is possible, but whether the claimed injury is of constitutional dimension. Where a given right or interest on the part of a legislature has been created by the legislature itself, it is arguable that the initial determination of whether a significant violation has occurred should be left to the legislature, and that the courts should abstain until it has done so.

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[6] Bork, Cir. Judge, dissenting in *Barnes v. Kline*, 759 F.2d 21, at 51 (D.C. Cir. 1985); *vacated as moot sub nom. Burke v. Barnes*, 107 S. Ct. 734 (1987).

That argument has no application to the case at bar. The power and duty of John Melcher to participate in the Senate's process of advice and consent to nominations for high federal office derives not from any action by the Senate, but from the combination of the textual grant of power in the Constitution, and the action of the people of the State of Montana in electing him to participate in that process.

The contention of the respondents that the failure of the Senate to enact legislation requiring Senate confirmation for appointees to the office in question extinguishes Senator Melcher's constitutional interest is inconsistent with our constitutional history. In determining the justiciability of his suit, the plaintiff is entitled to a presumption that he is correct in his claim that these defendants operate at a level of authority that *constitutionally* requires conformity with the Appointments Clause, *regardless* of the presence or absence of any statutory provision. As the court of appeals recently observed—

> In fact, the statutes enacted by the First Congress creating the various executive departments are silent regarding the mode of appointment of the principal officers of those departments, thereby suggesting that the legislators believed that they had no choice in the matter because they understood the Constitution to require that principal officers be appointed by the President with the advice and consent of the Senate and therefore it was not necessary to provide for appointment in the statute itself.

In re: Sealed Case, 838 F.2d 476, —— (slip opinion at 13-14, D.C. Cir.), prob. jur. noted, 56 U.S.L.W. 3568 (Feb. 22, 1988, No. 87-1279 in this Court).

The equitable discretion doctrine postulates that Melcher's "real quarrel" is with his fellow legislators, but such an argument reveals a fundamental misunderstanding of the nature and role of judicial review in

American government. *A priori*, it was not a matter of logical necessity that our system should have developed along the lines that it has. When first confronted with a claim that a legislative enactment was unconstitutional, this Court could conceivably have held, as the equitable discretion doctrine asserts, that the party making such a claim had a quarrel with those members of the legislature who had voted for the enactment in question. Under this theory, such members would have had to have been made parties and, if the claim were established, enjoined to vote to amend or repeal the offending enactment.

Needless to say, that is not the route we have taken. When *any* plaintiff claims to be injured by unconstitutional action, his quarrel is with those who have taken the action. This is so elementary that it would hardly bear stating if it were not necessary to rebut the "real quarrel" theory on which the equitable discretion doctrine rests. With all due respect to those who have embraced that theory, it cannot can be reconciled with the foundations of American constitutional law.

The requirement of the equitable discretion doctrine that the Senate first take action to amend or repeal an unconstitutional statute before injuries inflicted by officials claiming to act under its authority can be judicially recognized is in direct conflict with the principle enunciated in *Marbury v. Madison* that such a statute is void.[7] It is an elementary principle that the allegations of the plaintiff, if not patently frivolous, must, for the limited purpose of determining his standing, be assumed to be true. Senator Melcher claims that the legislative authorization for the defendants to act as they do is unconstitu-

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[7] 1 Cranch (5 U.S.) 137 at 180 (1803):

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that the courts, as well as other departments, are bound by that instrument.

tional and therefore void, yet the equitable discretion doctrine has the effect of allowing the defendants to plead the statute as a bar to the suit. Such a result is contrary to the law of standing as well as the broader principle of substantive law.

C. The Core Error of the Equitable Discretion Doctrine Is Its Assumption that the Mere Appearance of a Member of Congress as a Litigant Is Sufficient to Raise Significant Separation-of-Powers Concerns

The error at the core of the equitable discretion doctrine is its assumption that the mere appearance of a member of Congress as a plaintiff raises separation-of-powers concerns, regardless of the nature of the claim. There is no question that such concerns, *if present*, bear on the issue of standing, but the notion that the appearance of a congressman as a litigant is *per se* sufficient to raise them is inconsistent with the statement in *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968), that

> the question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.

Obviously, when members of Congress disagree among themselves, there is a sense in which a political issue is inevitably created, but the equitable discretion doctrine simply ignores the admonition in *INS v. Chadha*, 462 U.S. 919 at 943 (1983):

> Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . .

Far from resting upon sepaartion-of-powers principles, the equitable discretion doctrine defies those principles

by arbitrarily saddling Congress with a duty which as a matter of historical fact it has never performed and as a matter of institutional organization and interest it is incapable of performing. Concerned as it is with the onrushing flood of immediate, pragmatic problems and political pressures generated by a world in flux, Congress cannot undertake systematic review of questions about the constitutionality of existing statutes, whether arising from doctrinal developments such as *Buckley v. Valeo*, 424 U.S. 1, 125 (1976), within the legal system, or externalities such as the abandonment of the gold standard. For example, well before *Chadha*, there was substantial doubt about the constitutionality of the legislative veto, yet even after *Chadha*, Congress took virtually no action to amend existing statutes in which a legislative veto provision played a pivotal role, a failure which spurred considerable litigation in this and other courts.[8]

From its very inception, even some of the proponents of the doctrine of equitable discretion appear to have had serious misgivings about it. After conceding "that the court of appeals appears to have chosen a debatable pigeonhole here," the Solicitor General concluded his Brief for the Respondents in Opposition in *Riegle* not by endorsing the doctrine, but by suggesting only "that it would be useful for this Court to have the benefit of the court of appeals' experience under its new formulation before determining whether the rule announced by the court below deserves further review."

That experience has generated still more misgivings. In his concurring opinion in the court below, Circuit Judge Edwards, who was also a member of the *Riegle* panel, candidly stated, *infra*, 10a—

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[8] *See, e.g., Alaska Airlines v. Brock*, 107 S. Ct. 1476 (1987), *affirming* 766 F.2d 1550 (D.C. Cir. 1985); *EEOC v. Alistate Insurance Co.*, 467 U.S. 1232 (1984); *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

> Upon reflection, it is no longer clear to me that equitable discretion is a viable doctrine upon which to determine the fate of constitutional litigation.

In note 4, *infra*, 9a, Circuit Judge Starr stated that the court agreed "with our colleague's expression of concern over whether the court-fashioned doctrine of equitable discretion 'is a viable doctrine upon which to determine the fate of constitutional litigation.' "

D. The Equitable Discretion Doctrine as Applied in This Case Directly Conflicts With the Doctrine of Separation of Powers

As it has been applied in the case at bar, the inconsistency of the equitable discretion doctrine with the doctrine of separation of powers is particularly glaring. The Senate's power in respect of appointments of policy-making positions is executive, not legislative, and could as easily have been vested in the judiciary or in some organ especially created to exercise it. In this context, the equitable discretion rule generates the *non sequitur* that because the Senate possesses *legislative* power, a power which it can only utilize with the involvement of the President and the concurrence of the House, the *judicial* branch must therefore ignore a palpable injury to the Senate's *executive* power.

The result is an abdication by the judicial branch of a vital function which the other branches have neither the desire nor the ability to perform. The equitable discretion doctrine is erected upon the foundation of one of the most stunning oxymorons to be found in all the literature of the law, the concept of a legislative remedy. To say that a remedy exists for a grievance is to imply the existence of an authority which is under a duty to consider a complaint, under a duty to apply rational and consistent principles in such consideration, and under a duty to afford relief upon an appropriate showing. Our system of government imposes none of these duties on Con-

gress, for the very good reason that in a democratic order of society, the issues great and small with which such a body is required to deal do not ordinarily admit of that kind of resolution. If a process is legislative in the sense of lawmaking by a politically representative body as opposed to an administrative or judicial body, it cannot be a remedy because the requisite elements of duty and due process are lacking. Conversely, if the process is truly a remedy, then it is a process that a legislature cannot ordinarily undertake without losing its character as a representative, political institution.

E. The Public Importance of the Case

The most fundamental, overarching separation of powers is that between the power of the government and the power of particularized private interests. That separation is essential to the integrity of the political process by which free citizens maintain their control over the government which must ultimately be their servant, not their master. If that is lost, all is in jeopardy, no matter how meticulously each branch may be confined within its appointed sphere. That integrity is obviously compromised when powers of government, be they legislative, executive or judicial in nature, are placed in the hands of those who are neither elected by the people nor selected and screened as the Constitution requires.

Developments in recent years in the national and world economies have given the issue of the constitutionality of the composition of the Federal Open Market Committee a greater urgency than it has ever had before. As the Federal Reserve grows in importance, so does the injury to this plaintiff in the deprivation of his rightful, constitutional role in the selection of the officers who control it. If there has ever been a time in our history when the American people need firm assurance that the Federal Reserve will be free not only of improper and untoward influence, but even the appear-

ance of such influence, that time is now. There is nothing that can contribute more importantly to that assurance than this Court's insistence upon adherence to the Constitution in the structure and process of our government.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5692

JOHN MELCHER, HONORABLE MEMBER,
UNITED STATES SENATE,
Appellant

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-01335)

Argued October 5, 1987

Decided December 18, 1987

Before: EDWARDS, STARR, and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STARR.

Concurring opinion filed by *Circuit Judge* EDWARDS.

STARR, *Circuit Judge*: In this appeal, John Melcher, a United States Senator, challenges the constitutionality of the method used to select five of the twelve members of the Federal Reserve System's Federal Open Market Committee (FOMC). Senator Melcher argues that the five members are "officers" of the United States and thus must be appointed by the President with the advice and consent of the Senate in conformity with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2.

The District Court concluded that Senator Melcher had standing to bring this action, but ruled against him on the merits. In the trial court's view, the five members are not "officers" of the United States and therefore need not be appointed consistent with the strictures of the Appointments Clause. *Melcher v. FOMC*, 644 F. Supp. 510 (D.D.C. 1986). We affirm the District Court's judgment, but on a different ground. In our view, this court's decision in *Riegle v. FOMC*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), required that the District Court dismiss the suit on grounds of equitable discretion.

I

Senator Melcher's challenge represents a continuation of the long-lived battle over the composition of the Federal Open Market Committee. The history, structure and functions of the FOMC have been extensively discussed in prior decisions of this court, *see Committee for Monetary Reform v. Board of Governors*, 766 F.2d 538, 539-40 (D.C. Cir. 1985); *Riegle*, 656 F.2d at 874-76; *Reuss*

v. Balles, 584 F.2d 461, 462-64 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978), and we therefore need not replough this well-worn ground. Suffice it to say that of the twelve members of the FOMC, five are not appointed pursuant to the procedures ordained by the Appointments Clause. Unlike their seven colleagues who are nominated by the President and confirmed by the Senate, these five members are selected by the boards of directors of the several Federal Reserve Banks. 12 U.S.C. § 263(a) (1982). The five members are chosen from the presidents and first vice presidents of the various Reserve Banks, who hold their Reserve Bank offices subject to approval by the Board of Governors of the Federal Reserve System.

In light of the rich history of litigation over the appointments question, the arguments of Senator Melcher (and the three *amici curiae* supporting his position) as to the merits can be set forth in brief compass. Analyzing the FOMC's composition and functions, Senator Melcher maintains that members of the FOMC exercise "significant governmental authority." Brief for Appellant at 7-9. An illustration of that authority is the FOMC's ability to influence the size of reserve accounts at Federal Reserve Banks. According to Senator Melcher, that power is equivalent to the sovereign power to coin money. *Id.* at 33-46. Under the Supreme Court's holding in *Buckley v. Valeo*, 424 U.S. 1, 118-43 (1976) (per curiam), officials exercising such authority, the argument goes, must be appointed in the manner prescribed by the Appointments Clause.

II

Although the appointments controversy continues unabated, we are confronted with an insurmountable barrier to the resolution of Senator Melcher's claim. That barrier is the doctrine of equitable discretion articulated by this court in *Riegle v. FOMC*, *supra*, 656 F.2d 873.

Riegle involved a challenge identical to that advanced by Senator Melcher: a United States Senator challenged the constitutionality of the procedures for appointment of the five Reserve Bank members of the FOMC and sought an injunction against the exercise of voting powers by those members.[1] Although concluding that Senator Riegle had standing to sue, this court nonetheless "exercise[d] [its] equitable discretion to dismiss the case on the ground that judicial action would improperly interfere with the legislative process." *Riegle*, 656 F.2d at 882. Informing this holding was the fact that Senator Riegle had brought to the courthouse what amounted to a dispute properly within the domain of the legislative branch. Senator Riegle's attempt to win in court what he had sought and failed to obtain from his colleagues in Congress was viewed by the *Riegle* court as triggering highly sensitive concerns over the appropriate provinces of the Article I and Article III branches.

Riegle would thus appear to control this case. Relying on the District Court's analysis, however, Senator Melcher urges that our decision in that case does not warrant equity's staying its hand where, as here, no private plaintiff may be available to mount the constitutional challenge advanced by a Member of Congress. Brief for Appellant at 47; Reply Brief for Appellant at 18. The want of private plaintiffs to vindicate the constitutionally prescribed method of appointment is heralded, the District Court concluded, by this court's decision in *Committee for Monetary Reform, supra*, 766 F.2d 538. There, a group of private individuals and businesses, who al-

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[1] *Riegle* represented the second attempt by a Member of Congress to challenge the allegedly unconstitutional composition of the FOMC. In the first challenge, brought by Congressman Henry Reuss, the complaint was dismissed for lack of standing. *Reuss, supra*, 584 F.2d at 471.

legedly suffered financial damage due to the money supply policies of the Federal Reserve System, raised constitutional challenges to the composition of the FOMC. This court dismissed the claim, holding that the plaintiffs lacked standing to maintain the suit. *Id.* at 544. In the District Court's view, that decision's delivery of a knockout blow to private litigants mounting an Appointments Clause challenge creates an entirely different state of affairs from that presented to us in *Riegle*. *Melcher, supra*, 644 F. Supp. at 515-16.

The District Court's position in this regard is grounded upon the *Riegle* court's references to the probable availability of a private plaintiff to maintain a similar action. Interpreting those references as constituting part of *Riegle*'s holding, the District Court discerned the following principle of law: "[L]egislators will be denied access to the courts only when private plaintiffs are available to bring the type of suit brought by the legislator." *Id.* at 515 (footnote omitted). Since "it is beyond question that private plaintiffs lack standing to challenge the FOMC and its Reserve Bank members," *id.* at 516,[2] the District Court held that the doctrine of equitable discretion may not appropriately be invoked to dismiss Senator Melcher's complaint. *Id.* at 517. For the following reasons, we respectfully disagree.

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[2] The District Court based its conclusion that all private plaintiffs lack standing to challenge the alleged violation of the Appointments Clause on the Supreme Court's decisions in *Allen v. Wright*, 468 U.S. 737 (1984), and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). For the reasons that follow in the text, we find it unnecessary to address this aspect of the District Court's opinion and, accordingly, decline to speculate on whether *anyone* would have standing to bring this suit.

First, the *Riegle* court's discussion of possible suits by private plaintiffs is dicta. *Riegle*'s clear holding is set forth in one sentence: "Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action." 656 F.2d at 881. Only after setting forth this clear principle of law does the court embark on a three-paragraph exegesis seeking to demonstrate how its standard would apply in a variety of situations. It is in this illustrative discussion that the private-plaintiff factor is introduced. At the close of the exegesis, the private-plaintiff factor disappears; the opinion closes with its focus once more on Senator Riegle's remedies in Congress, not on the presence (or absence) of a private plaintiff to carry on this sort of suit. Reiterating the rationale undergirding the court's holding, Judge Robb in writing for the *Riegle* court stated: "It would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle." *Id.* at 882.

Subsequent decisions confirm that the *Riegle* court's private-plaintiff references are dicta. In *Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985), Members of Congress and private plaintiffs brought an action asserting a right to an accurate report of Congressional proceedings. The court dismissed the private plaintiffs' complaint for failure to state a cause of action. Then, relying on the doctrine of equitable discretion, the court went on to dismiss the Congressional plaintiffs' constitutional challenge as well. The court declined the invitation to entertain the legislators' suit despite the court's appreciation of the obvious fact that such a disposition would render a constitutional question unreviewable. *Id.* at 549. In so doing, the *Gregg* panel observed that "this court has

never squarely held that, where private plaintiffs are held to lack standing, an action by a congressional plaintiff may not be dismissed on prudential grounds." *Id.* at 544.

Similarly, the court's disposition of *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983), provides further indication that the inability of private plaintiffs to maintain a suit does not constrain the court's exercise of equitable discretion. In *Vander Jagt*, the court dismissed an action brought by certain Congressmen contesting the allocation of committee and subcommittee seats. There again, the court declined to entertain the legislators' constitutional claim even though no private plaintiff appeared capable of bringing the issue to court. *Id.* at 1175 & nn.24-25. So too, in *Committee for Monetary Reform*, *supra*, 766 F.2d at 544 n.38, the court expressly left open the question of the relevance of the ability of private plaintiffs to sue, the obvious implication being that *Riegle* did not dispose of the question.

But there is a more fundamental difficulty with *Riegle*'s non-binding observations about the role of private plaintiffs. Specifically, the separation-of-powers concerns informing the doctrine of equitable discretion are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit. As *Riegle* itself recognized, those concerns are implicated by the judiciary's resolution of issues that are appropriately left to the legislative arena. The ability (or not) of a private plaintiff to sue implicates an entirely distinct matter—the role of the federal courts in adjudicating non-frivolous claims of constitutional violations. The *Riegle* court in dicta seemed vexed by the possibility that "non-frivolous claims of unconstitutional action would go unreviewed by a court." 656 F.2d at 882. That concern places in tension the vin-

dication of meritorious claims grounded in the higher law of the Constitution against the "proper—and properly limited—role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

The concern that constitutional claims be vindicated, the Supreme Court has taught, does not sweep so broadly as to remold the historic role of the federal courts in our constitutional system of government. Courts are not at liberty to embark upon a broad, undifferentiated mission of vindicating constitutional rights; after all, Article III specifically limits the judicial power of the United States to the resolution of actual cases or controversies. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Supreme Court recently reminded us again of the judiciary's traditional and limited role. There, private plaintiffs brought suit challenging a transfer of certain property to a religiously affiliated institution as violative of the Establishment Clause. The Court held that the plaintiffs lacked standing not because their constitutional claim was insubstantial, but because their claim was nothing more than a "generalized grievance." Under the *Valley Forge* analysis, the fact that a constitutional violation might go unredressed does not, in itself, permit the federal courts to entertain the suit. That principle, it seems to us, applies just as readily to situations where Congressional plaintiffs are stymied by the (apparent) incapacity of prospective private plaintiffs waiting in the wings to carry on constitutionally based claims.

III

Lest there be any lingering doubt, we expressly disapprove *Riegle's* intimation in dicta that the standing of private plaintiffs to bring a particular action affects the

propriety of our entertaining the same challenge when brought by a legislator.[3] That being so, our disposition of Senator Melcher's claim is controlled by the holding in *Riegle*: if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action.[4] For that reason, the opinion of the District Court is vacated and its judgment dismissing the action is

Affirmed.

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[3] The statement in the text sentence disapproving *Riegle*'s intimation in dicta has been separately circulated to and approved by the entire court, and thus constitutes the law of the circuit. *See Irons v. Diamond*, 670 F.2d 265, 268 & n.11 (D.C. Cir. 1981).

[4] We are in agreement with our colleague's expression of concern over whether the court-fashioned doctrine of equitable discretion "is a viable doctrine upon which to determine the fate of constitutional litigation." Concurring Op. at 1. As a panel, however, we are bound faithfully to follow the law of the circuit. Judge Edwards makes the point succinctly: "[*Riegle*] must be followed until rejected by this court *en banc* or the Supreme Court." *Id.*

EDWARDS, *Circuit Judge, concurring*: The narrow question this case presents is whether the principle of equitable discretion we articulated in *Riegle* obliges us to refuse to reach the merits of Senator Melcher's suit, notwithstanding the inability of some, perhaps all, private plaintiffs to raise his challenge following our decision in *Committee for Monetary Reform*. The answer is that those principles plainly do forbid our addressing Senator Melcher's constitutional argument. *Riegle* held that dismissal of a legislator's suit is appropriate "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute." 656 F.2d at 881. In that case, we found that Senator Riegle could obtain redress were he able to persuade his colleagues to alter the method by which the five Reserve Bank members of the FOMC are appointed. Senator Melcher is in exactly the same situation. We are therefore constrained to dismiss his suit.

The possibility that no one else could bring Senator Melcher's constitutional challenge does not require us to depart from the result we reached in *Riegle*, despite stray dicta to the contrary in our opinion in that case. *Cf. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). Upon reflection, it is no longer clear to me that equitable discretion is a viable doctrine upon which to determine the fate of constitutional litigation. Nonetheless, *Riegle* is the law of the circuit and it must be followed until rejected by this court *en banc* or the Supreme Court.

Because our holding in *Riegle* controls the resolution of this case, I see no reason to join the majority in speculating on the proper resolution of the alleged "tension" between "the vindication of meritorious claims grounded in the higher law of the Constitution" and the

"role of the courts in a democratic society." I particularly wish to distance myself from the majority's sweeping claims about the mission of the federal courts in our constitutional system. These concluding dicta allude unnecessarily to monumental questions not before this court. I therefore concur in the majority's result, but not in its opinion.*

* I join in the majority's disapproval of the suggestion in *Riegle* that the ability of a private plaintiff to bring a particular suit affects the propriety of our entertaining the same challenge when brought by a legislator. *See* Majority op. at 9 n.3.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed Sept. 28, 1984]

MEMORANDUM ORDER

In this action United States Senator John Melcher of Montana seeks an injunction prohibiting those members of the Federal Open Market Committee who were not appointed by the President with the advice and consent of the Senate, from voting and serving on the Committee. An identical action was brought in 1981 by Senator Riegle but was ultimately dismissed on the ground that a judicial decision would improperly interfere with the legislative process. *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981). Specifically, the Court of Appeals held that the plaintiff had standing to bring the suit but that, due to separation-of-powers concerns, equitable discretion was to be exercised so as to cause a dismissal of the action. The court's holding, however, was limited to those cases brought by members of Congress in which legislative redress was available *and* a private plaintiff could bring a similar action. Indeed, the Court explicitly noted that

> although prudential considerations warrant the dismissal of Senator Riegle's claim, one can easily conceive of a private plaintiff who could acquire standing to bring a similar claim. A person with significant economic interests in the open securities markets and prime lending rates, *e.g.*, a major corporation, pension fund, or other major investor, might qualify for standing to challenge the constitutionality of a procedure which allegedly permits improperly appointed officials to so substantially influence the monetary policy of the United States, open market trading, and prime rates.

656 F.2d at 881.

Thereafter, *Committee for Monetary Reform* v. *Board of Governors of the Federal Reserve System*, C.A. No. 83-1730—an action brought by a group of over 800 private plaintiffs seeking the same relief that Senator Melcher seeks in this action—was dismissed by Judge Pratt of this Court on the ground that plaintiffs lacked standing. That case is currently pending before the Court of Appeals for this Circuit. If the appellate court ultimately holds that the plaintiffs in that case, or at least some of them, having standing, then the present action would be subject to dismissal under the rationale of *Riegle*. However, if the Court of Appeals finds that plaintiffs in *Committee for Monetary Reform* lack standing, then in light of *Riegle* and subsequent cases,[1] a decision may have to be made whether the instant case should be decided on the merits or dismissed for separation-of-powers reasons.

For the reasons stated, and in the interest of judicial economy,[2] it is this 26th day of September, 1984,

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[1] See, *e.g.*, *Moore* v. *U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984); *Vander Jagt* v. *O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983); *Crockett* v. *Reagan*, 720 F.2d 1355 (D.C. Cir. 1983).

[2] Senator Melcher has requested leave to appear as *amicus curiae* in *Committee for Monetary Reform* in the Court of Appeals *inter alia* for the reasons discussed herein.

ORDERED By the Court *sua sponte* that this action be and it is hereby stayed pending the decision of the Court of Appeals in *Committee for Monetary Reform.*

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed June 5, 1986]

OPINION

United States Senator John Melcher of Montana, the plaintiff in this action, has challenged the process by which five members of the Federal Reserve Board's Federal Open Market Committee (hereinafter FOMC) are selected. The gravamen of his complaint is that these five members, known as the "Reserve Bank members," are selected in violation of the appointments clause, Article II, § 2, cl. 2 of the Constitution, because they are selected by the boards of directors of the several Federal Reserve Banks—private individuals—rather than by the President of the United States with confirmation by the Senate. *See* 12 U.S.C. § 263(a).[1]

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[1] The operations of the FOMC, and the methods by which its members are appointed, have been comprehensively described by the Court of Appeals for this Circuit:

> The Federal Reserve System, established in 1913 as the nation's central bank, is composed of both public and private elements. In addition to the FOMC, the System includes the Board of Governors, the twelve regional Federal Reserve Banks, the Federal Advisory Council, and the approximately 5,500

The adjudication of Senator Melcher's cause has travelled a long and somewhat tortuous course, due essentially to recent changes in the state of the law in this area. Thus, the action had to be stayed September 26, 1984, pending the appeal in *Committee for Monetary Reform* v. *Board of Governors*, No. 83-1730 (D.D.C. Oct. 26, 1983), *aff'd*, 766 F.2d 538 (D.C. Cir. 1985), which

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privately owned commercial banks that are members of the System. Among the principal functions of the Federal Reserve System is the conduct of monetary policy, the aim of which is to promote national economic goals through influence on the availability and cost of bank reserves, bank credit, and money. The three primary means through which the System implements monetary policy are open market operations, regulation of member bank borrowing from the Federal Reserve Banks, and establishment of member bank reserve requirements.

The most important of these methods, open market trading—*i.e.*, the purchase and sale of Government securities in the domestic market—is exclusively the function of the FOMC. The Committee is compromised of twelve members: the seven members of the Board of Governors of the Federal Reserve System, who are appointed by the President with the advice and consent of the Senate, and five representatives of the Federal Reserve Banks, who are elected annually by the boards of directors of the Banks from among the Banks' presidents and first vice presidents. The Federal Reserve Banks are private corporations whose stocks is owned by the member commercial banks within their districts. The board of directors of each Reserve Bank consists of six members elected by the member commercial banks and three members appointed by the Board of Governors of the Federal Reserve System. The presidents and five vice presidents of the Reserve Banks are selected by the respective boards of directors but are subject to approval, suspension and removal by the Board of Governors. In short, the FOMC consists of seven members who hold their offices by virtue of presidential appointments confirmed by the Senate, and five members who are elected by Reserve Bank boards of directors, and who hold their offices subject to the approval of the Board of Governors.

Committee for Monetary Reform v. *Board of Governors of the Federal Reserve System*, 766 F.2d 538, 539-40 (1985) (footnotes omitted).

was claimed to be dispositive of the issues here. The decision in that case, when it was issued, was found to be in significant tension with an earlier case, *Riegle* v. *FOMC*, 656 F.2d 873 (D.C. Cir. 1981), and this necessitated new submissions and a hearing on the motion to dismiss. Between *Riegle* and *Committee for Monetary Reform*, the Supreme Court decided *Allen* v. *Wright*, 104 S. Ct. 3315 (1984), which also had an impact on the issues here, and finally, the recent decision in *Synar* v. *United States*, 626 F. Supp. 1374 (three judge court), *prob. juris. noted*, 106 S. Ct. 1181 (1986), generated still another round of pleadings from the parties and required renewed consideration by the Court.

After consideration of numerous submissions by all parties, and after hearing, the Court now decides the question of Senator Melcher's ability to pursue his claim in federal court.

I

Supreme Court pronouncements establish a two-part test for standing questions. A litigant must (1) allege a "distinct and palpable" injury to himself; and (2) show that the injury is " 'fairly' traceable to the challenged action" and that it is capable of being redressed by a favorable decision. *Allen* v. *Wright*, *supra*, 104 S. Ct. at 3325; *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472-73 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

The first prong of this test may be termed the "injury" requirement, while the second constitutes the "causation" requirement. *See Allen* v. *Wright*, *supra*, 104 S. Ct. at 3326 n.19.

The standing doctrine is, of course, one means for limiting court intervention to the resolution of those controversies envisioned by the framers of Article III. The courts' role in the constitutional scheme consists of

deciding highly particularized disputes between individual litigants and avoiding broad public policy determinations that are more appropriately made by the political branches. The injury requirement ensures that the judicial process will be "more than a vehicle for the vindication of the value interests of concerned bystanders," *Valley Forge College*, *supra*, 454 U.S. at 473 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)); the causation requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* at 472.

If plaintiff is correct that five members of the FOMC exercise their powers in derogation of the Constitution's appointments clause, the injury suffered by the United States Senate as an institution is fairly obvious: that body is deprived of its constitutionally delegated power to review the credentials of persons exercising executive authority. *See Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984); *Riegle* v. *FOMC*, 656 F.2d 873, 878 (D.C. Cir. 1981); *Kennedy* v. *Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974). Senator Melcher's individual standing to assert the Senate's interest in safeguarding its confirmation power has been sustained in a case that is—one the standing issue at least—on all fours with this one:

> [A]ssuming that the five Reserve Bank members of the FOMC are officers who must be appointed with the advice and consent of the Senate, [an individual Senator's] inability to exercise his right under the Appointments Clause of the Constitution is an injury sufficiently personal to constitute an injury-in-fact.

Riegle v. *FOMC*, 656 F.2d at 878. *See also*, *Moore* v. *U.S. House of Representatives*, *supra*, 733 F.2d at 951-53 (individual members of House possessed standing to

challenge origination of revenue bill in Senate). The conclusion that standing exists in this case is buttressed by *Synar* v. *United States*, *supra*, 626 F. Supp. at 1374. *Synar* held that members of Congress could challenge an automatic deficit reduction procedure,[2] on the ground that the procedure granted to the Comptroller General and the President power to nullify the members' votes on appropriations legislation.[3] *Synar* v. *United States*, 626 F. Supp. at 1381-82.

The existing procedure for appointing FOMC members, if unconstitutional, similarly deprives Senator Melcher of his vote for or against confirmation. The fact that *Synar* involved a nullification of prior votes, while this case involves a deprivation of Melcher's right to vote in the first instance, is a distinction without difference. In either case, the plaintiff suffers a " 'specific and cognizable' [injury] arising out of an interest 'positively identified by the Constitution.' " *Id.* (*quoting United Presbyterian Church* v. *Regan*, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (*quoting Moore* v. *United States House of Representatives*, *supra*, 733 F.2d at 951)). Just as the automatic deficit reduction act "interfere[d] with [plaintiffs'] 'constitutional duties to enact laws regarding federal spending,' " *id.*, so the invalid appointment of FOMC members interferes with Senator Melcher's constitutional

[2] *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037. Although standing to members of Congress was conferred in the statute itself, Congress obviously lacks the ability to expand the constitutional aspects of standing analysis. Thus, *Synar* buttresses the conclusion that constitutional standing is present, even though it would not be an obstacle to "prudential" standing limitations imposed by the federal courts on their own power, including "equitable discretion." *See, e.g., Allen* v. *Wright*, *supra*, 104 S. Ct. at 3324-25. The Court relies upon *Riegle* and *Moore* in concluding that prudential considerations ought not to be applied to bar standing here.

[3] The deficit reduction bill was ultimately declared unconstitutional on other grounds.

right and duty to advise and give consent to executive appointments. *See also, Crockett* v. *Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (Bork, J., concurring (action which nullifies or diminishes congressman's vote creates injury-in-fact necessary for standing).

The causation prong of the analysis is more difficult, but also leads to a conclusion that standing exists. The gravamen of Senator Melcher's complaint is that 12 U.S.C. § 263(a) is unconstitutional, and that the defendants in this action, who were appointed pursuant to that section, cannot legally exercise the powers they have adopted.

To be sure, it can be argued that the defendants' allegedly illegal exercise of executive power is not the direct cause of plaintiff's injury, for it is the *appointment* of these defendants without the Senate's advice and consent, rather than their activities after appointment, that directly causes the injury. On this basis, it could be said that the only proper defendants in this case are the directors of the Federal Reserve banks who appointed these defendants.

The Court of Appeals has previously addressed this argument and rejected it. *Riegle* v. *FOMC*, *supra*, 656 F.2d at 879 (D.C. Cir. 1981). The court noted that the causation prong of the standing analysis is satisfied where it is shown that "prospective [judicial] relief will remove the harm." *Id.* (quoting *Warth* v. *Seldin*, 422 U.S. at 498-99). A declaration that appointments under section 263(a) are unconstitutional would, quite obviously, constitute an advisory opinion if it did not also amount to a declaration that persons appointed under that section have no lawful authority and can be enjoined from exercising executive powers. Thus, it was proper for Senator Melcher to name the Reserve Bank members of the FOMC in his complaint.

His failure also to name the persons purportedly exercising an illegal appointment power does not deprive him of standing, where the named defendants satisfy both rationales underlying the Supreme Court's (standing pronouncements, for two reasons. First, the named defendants, like Senator Melcher, have a very real stake in the outcome of the dispute. They are far more than "concerned bystanders," *Valley Forge College*, *supra*, 454 U.S. at 473 (quoting *United States* v. *SCRAP*, *supra*, 412 U.S. at 687); rather, they are the most obvious beneficiaries of the disputed appointments process. Second, invalidation of section 263(a) will, for the reasons already stated, necessarily deprive the defendants of their powers, a result that certainly qualifies as "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* at 472.

II

That brings the Court to the most difficult question in this case: whether it should invoke the doctrine known as equitable discretion laid down by *Riegle* v. *FOMC*, *supra*, and decline to entertain the lawsuit notwithstanding the fact that the Senator posseses Article III standing.

In *Riegle*, Senator Donald W. Riegle, Jr., of Michigan, brought a suit that is identical to this one in all pertinent respects. Like Senator Melcher, Senator Riegle sued the FOMC and its Reserve Bank members, alleging that 12 U.S.C. § 263(a) violates the appointments clause and seeking an injunction against the exercise of voting powers by the individual defendants. The Court of Appeals ruled that Senator Riegle had standing to sue. 656 F.2d at 878-79. But because frequent attempts had been made in Congress to change the manner of selecting FOMC members, the court stated that it was wary of allowing a legislator to seek resolution of disputes with his legislative colleagues by suing in the courts on a hotly contested issue. Without denying standing, there-

fore, the court exercised a concept known as "equitable discretion" to dismiss the action. *Id.* at 879-82.

Significantly, however, the court limited its concept of equitable discretion as follows: legislators will be denied access to the courts only when private plaintiffs are available to bring the type of suit brought by the legislator.[4] The court dismissed Riegle's suit because there were many private plaintiffs available: "a major corporation, pension fund, or other major investor." *Id.* at 881.

In a subsequent Court of Appeals case, *Committee for Monetary Reform* v. *Board of Governors*, *supra*, 766 F.2d 538 (D.C. Cir. 1985), the court heard a challenge to the FOMC brought by the very private plaintiffs it had intimated were available when it decided *Riegle*. Notwithstanding the *Riegle* statement, the court denied them standing, holding that the connection between their injury (high interest rates) and the alleged constitutional violation (the appointment process employed to select FOMC members) was simply too tenuous to support standing under recent Supreme Court decisions. In the view of the court, the plaintiffs could not show that a different appointment process would produce different members who would adopt different interest rate policies. *Id.* at 542.[5]

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[4] The Court also required that legislative redress be available to a congressional plaintiff before equitable discretion could apply. Here, there is no question that a statutory change would moot Senator Melcher's lawsuit, so the only element of the doctrine this Court need address is the availability of non-congressional plaintiffs.

[5] In a footnote 37 to the opinion, the court attempted to reconcile its two decisions, noting that when *Riegle* was decided several key Supreme Court decisions on standing—*Valley Forge Christian College* v. *Americans United for Church and State*, 454 U.S. 464 (1982), and *Allen* v. *Wright*, 104 S. Ct. 3315 (1984)—had not yet been issued. The obvious suggestion was that if the *Riegle* court had known that corporations, pension plans, and the like lacked standing, it would not have exercised equitable discretion.

The Court of Appeals could not appropriately resolve the tension between *Riegle* and *Committee for Monetary Reform* because no congressional plaintiffs were present in the latter case. This Court, however, must address the obvious inconsistency between the two decisions. If both precedents are mechanically applied, the result is that section 263(a) is immune from constitutional attack. Private plaintiffs lack standing to challenge it,[6] and congressional plaintiffs are barred by the doctrine of equitable discretion. This result was clearly not contemplated by the *Riegle* court, which squarely grounded its holding on the assumption that "a similar action could be brought by a private plaintiff." *Riegle*, *supra*, 656 F.2d at 882. Nor was it accepted by the *Committee for Monetary Reform* court, which noted that "*Riegle* was decided prior to the Supreme Court's most recent [standing] articulations." 766 F.2d at 544 n.37. The *Committee for Monetary Reform* court was fully aware of the argument that its denial of standing to private plaintiffs might mean that "a subsequent action brought by a Senator may not be dismissed on prudential grounds," but "express[ed] no opinion on the question, the resolution of which must await another day." *Id.* at 544 n.38.[7]

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[6] The *Riegle* court grounded its exercise of equitable discretion on the assumption that:

> "A person with significant economic interests in the open securities markets and prime lending rates, *e.g.*, a major corporation, pension fund, or other major investor, might qualify for standing to challenge the constitutionality of a procedure which allegedly permits improperly appointed officials to so substantially influence the monetary policy of the United States, open market trading, and prime rates."

656 F.2d at at 881. Each of these hypothetical private plaintiffs was an actual plaintiff in *Committee for Monetary Reform*, and all were denied standing.

[7] The propriety of exercising equitable discretion when no private plaintiff is available to challenge the constitutionality of legislation was likewise left open in *Gregg* v. *Barrett*, 771 F.2d 539, 544 (D.C. Cir. 1985). *Vander Jagt* v. *O'Neill*, 699 F.2d 1166 (D.C. Cir.

That day has now arrived. Fortunately, the task of reconciling two seemingly conflicting precedents is less difficult than at first appears. It is apparent that the law of standing has changed substantially since the time when *Riegle* was decided, and those changes have been most significant for plaintiffs such as those who brought *Committee for Monetary Reform*. Thus, while it is arguable whether private plaintiffs could have survived a careful standing analysis when *Riegle* was decided, it is beyond question that private plaintiffs lack standing to challenge the FOMC and its Reserve Bank members today, after the Supreme Court's decision in *Valley Forge*,[8] and *Allen* v. *Wright*.[9]

1983), which involved congressional plaintiffs' direct challenge to the internal workings of the House, is plainly distinguishable from the case before this Court.

[8] In *Valley Forge*, *supra*, the Court clarified its previous standing decisions in cases like *United States* v. *SCRAP*. In particular, the Court stressed that the presence of a legitimate injury and a means of judicial redress were insufficient to confer standing on plaintiffs who could not show that they themselves were both injured and likely to benefit from judicial action. 454 U.S. at 486-87. The Court found that plaintiffs residing in Maryland and Virginia could not challenge the federal government's transfer of property to a religious entity in Pennsylvania. There was no suggestion that plaintiffs' tax liability would in fact be lowered if the government revoked the transfer, just as there was no showing that plaintiffs would personally benefit if the government kept the property. The only "injury" to plaintiffs that would be redressed by judicial action was the "psychological" injury "presumably produced by [plaintiffs'] observance of conduct" violative of the establishment clause. *Id.* at 485. That was deemed to be not enough. This is similar to *Committee for Monetary Reform* where the private plaintiffs could not show that "monetary instability and high interest rates," the injuries they allegedly suffered, would diminish if the court declared section 263(a) unconstitutional. 766 F.2d at 542. It is entirely possible that new members of the FOMC, appointed with Senate advice and consent, would maintain the same policies as their predecessors. *Id.*

[9] In *Allen* v. *Wright*, *supra*, parents of public school students alleged that the Internal Revenue Service was illegally granting tax-

Valley Forge and *Allen* v. *Wright* both make clear that standing by private parties will not be supported by a *possibility* that judicial action can redress plaintiff's injury. Certainly in the causal chain between plaintiff's injury, defendant's conduct, and judicial relief altering that conduct must be present. That refinement in the court's standing analysis was not obvious when *Riegle* was decided.[10]

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exempt status to private schools that practiced discrimination, and that the requisite injury could be inferred from the probability that tax subsidies to the private schools enabled the latter to draw from the public school system white students who might otherwise attend public school with the plaintiffs' children. The Court ruled that plaintiffs lacked standing, because their allegations that illegal tax exemptions caused the public schools to remain segregated, and that judicial action to remove the private schools' tax-exempt status would tend to desegregate the public schools, were "entirely speculative." 104 S. Ct. at 3328-29. Plaintiffs could not prove that withdrawal of the tax exemptions would end discrimination policies at the private schools, nor could they establish that it would lead to racial desegregation of the public schools. The injury suffered by plaintiffs' children might be lessened by judicial action, or it might not.

[10] The Supreme Court's standing decisions in cases like *United States* v. *SCRAP*, 412 U.S. 669 (1973), could then have supported a conclusion that some of the plaintiffs in *Committee for Monetary Reform* possessed standing to challenge FOMC appointments. In *SCRAP*, it was held that an unincorporated association of five law students had standing to challenge changes in rail rates fixed by the Interstate Commerce Commission. The students believed that increased rail rates would injure the materials recycling industry and that less recycling would mean more pollution, greater consumption of natural resources, increased prices for consumer goods and higher taxes to finance waste disposal. *Id.* at 678. The students further alleged that they used "the forests, streams, mountains and other resources in the Washington metropolitan area" for recreation, and that "this use was disturbed by the adverse environmental impact caused by a rate increase . . . ." *Id.* at 685. Despite the obviously tenuous connection among the plaintiffs' personal injury,

Accordingly, *Riegle* itself impels this Court to conclude that equitable discretion may not appropriately be applied to deny standing to plaintiff in this case, inasmuch as no private plaintiff is available to enforce the appointments clause of the Constitution. Under those circumstances, this Court would be acting well beyond its authority if it declined to hear Senator Melcher's case.[11] The Court's discretion to refuse a constitutionally proper plaintiff access to the courts, because of legitimate separation of powers concerns, is not so broad that the Court may abdicate its own role in the constitutional scheme and effectively immunize section 263(a) from any judicial review whatsoever. *See Marbury* v. *Madison*, 1 Cranch 137, 176 (1803) ("[i]t is, emphatically, the province and duty of the judicial departments to say what the law is").

An appropriate order accompanies this Opinion.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

June 5, 1986

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the ICC's rate increase, and a court order setting aside the increase, the court found standing:

> "We cannot say on these pleadings that the appellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact by the Commission action . . . ."

Id. at 690.

It seems reasonable that the Court of Appeals' invocation of equitable discretion in *Committee for Monetary Reform* was predicated upon a belief that some private plaintiffs could establish a causal connection—between their economic injuries and the composition of the FOMC—that was as strong as the causal connection accepted by *SCRAP*.

[11] *See also Synar, supra.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed June 5, 1986]

ORDER

In accordance with the reasons stated in the Opinion issued this date, it is this 5th day of June, 1986

ORDERED that defendants' motion to dismiss be and it is hereby denied; and it is further

ORDERED that supplemental briefs on the respective motions for summary judgment be filed on or before June 16, 1986, that oppositions thereto be filed on or before June 23, 1986; and that no replies will be permitted; and it is further

ORDERED that a hearing on the motions for summary judgment shall be held at 10:00 a.m., July 1, 1986, in Courtroom No. 1.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed June 10, 1986]

MEMORANDUM

Defendants have asked this Court to certify its June 5, 1986 Opinion and Order on the standing issue to the Court of Appeals for interlocutory review under 28 U.S.C. § 1292(b).

It is well settled that section 1292(b) is to be used sparingly, and only in those exceptional cases where an immediate appeal may avoid protracted and expensive litigation. *Kraus* v. *Board of County Road Commissioners*, 364 F.2d 919, 922 (6th Cir. 1966); *Milbert* v. *Bison Laboratories*, 260 F.2d 431, 433 (3d Cir. *en banc* 1958); *William Passalacqua Builders* v. *Resnick Developers South*, 611 F. Supp. 281, 284-85 (S.D.N.Y. 1985); *Kennard* v. *United Parcel Service*, 531 F. Supp. 1139, 1148-49 (E.D. Mich. 1982). This Court has no quarrel with defendants' characterization of the standing and equitable discretion issues as difficult questions of law, about which substantial differences of opinion exist. That much is clear from this Court's own opinion. However, the Court cannot agree with the defendants' assertion that certification will materially expedite the litigation. The case will likely be decided on summary judg-

ment. The relatively brief interval required to hear and decide dispositive motions will not prejudice the defendants, whereas the length of time required for appellate review would substantially prejudice plaintiff should he prevail in the Court of Appeals on the interlocutory question.[1] "The critical requirement" for certification—"substantial[] accelerat[ion] . . . of the litigation"—is not present here. *See* 9 Moore's *Federal Practice* ¶ 110.22[2] at 260 (2d ed.). In *United States ex rel. Hollander* v. *Clay*, 420 F. Supp. 853, 858-59 (D.D.C. 1976), where novel constitutional issues were also present, the court likewise declined certification.

An appropriate order accompanies this Memorandum.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

June 10, 1986

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[1] This case was filed April 30, 1984. A plaintiff is prejudiced whenever he experiences an unusually long delay in securing relief. In addition, it is to be noted that Senator Melcher's claim could be mooted by the expiration of his term of office.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed June 10, 1986]

ORDER

For the reason stated in the Memorandum issued this date, and upon review of the record, it is this 10th day of June, 1986

ORDERED that defendants' motion for section 1292(b) certification be and it is hereby denied; and it is further

ORDERED that defendants shall file their motion for summary judgment, if any, on or before July 3, 1986, and that plaintiff shall oppose any such motion on or before July 11, 1986; and it is further

ORDERED that defendants shall oppose plaintiff's motion for summary judgment on or before July 11, 1986; and it is further

ORDERED that plaintiff may supplement his motion for summary judgment on or before July 3, 1986, and that defendants may oppose any such supplement on or before July 11, 1986; and it is further

ORDERED that no replies to oppositions shall be permitted; and it is further

ORDERED that a hearing on plaintiff's motion for summary judgment, and on defendants' motion for summary judgment if such a motion is filed, shall be held at 10:00 a.m., July 16, 1986, in Courtroom No. 1.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5374

IN RE: FEDERAL OPEN MARKET COMMITTEE, *et al.*

[Filed June 24, 1986]

Before: EDWARDS, BORK, and SILBERMAN, *Circuit Judges.*

ORDER

Upon consideration of the Petition for Mandamus and Request for Expedited Consideration, and petitioners' Emergency Motion for Stay, it is

ORDERED by the court that the request for expedited consideration be granted. It is

FURTHER ORDERED by the court that the petition for a writ of mandamus be denied. Petitioners have not demonstrated that the district court "is clearly without jurisdiction." *Ex parte Chicago Rock Island & Pacific Ry.*, 255 U.S. 273, 275 (1921). As this court recently noted, "[i]f lack of jurisdiction is not clear, but merely doubtful, the writ should be denied." *In re United States Parole Commission*, No. 85-1205, slip op. at 9 (D.C. Cir. June 17, 1986) (footnote omitted). Furthermore, "mandamus may not substitute for an appeal," *id.*, and petitioners have failed to demonstrate that injury will result from consideration of an appeal in the normal course. It is

FURTHER ORDERED by the court that the emergency motion for stay be dismissed as moot.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed Sept. 25, 1986]

OPINION

United States Senator John Melcher of Montana, the plaintiff in this action, has challenged the process by which five of the twelve members of the Federal Reserve Board's Federal Open Market Committee (FOMC or Committee) are appointed. The gravamen of his complaint is that these five members, known as the "Reserve Bank members," are selected in violation of the Appointments Clause, Article II, § 2, cl. 2, of the Constitution, because they are chosen by the boards of directors of the several Federal Reserve Banks—private individuals—rather than by the President of the United States. 12 U.S.C. § 263(a). As a consequence, it is said, Senator Melcher and the other members of the United States Senate are improperly prevented from exercising with respect to these persons the advice and consent responsibility they possess under the Constitution.

The Court has previously rejected the government's[1] argument that the Senator lacks standing to bring the

[1] The defendants in this action are the five "private" members of the FOMC, the five alternate private members of the FOMC, and the FOMC. However, all of the defendants are represented by the Department of Justice.

action,[2] and it is now considering the merits. Upon such consideration, the Court concludes that section 263(a) does not violate the Appointments Clause, and it will therefore grant summary judgment to the defendants.

I

The Court of Appeals for this Circuit has described the operations of the Federal Open Market Committee, and the methods by which its members are appointed, as follows:

> The Federal Reserve System, established in 1913 as the nation's central bank, is composed of both public and private elements. In addition to the FOMC, the System includes the Board of Governors, the twelve regional Federal Reserve Banks, the Federal Advisory Council, and the approximately 5,500 privately owned commercial banks that are members of the System. Among the principal functions of the Federal Reserve System is the conduct of monetary policy, the aim of which is to promote national economic goals through influence on the availability and cost of bank reserves, bank credit, and money. The three primary means through which the System implements monetary policy are open market operations, regulation of member bank borrowing from the Federal Reserve Banks, and establishment of member bank reserve requirements.

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[2] Opinion of June 5, 1986. The Court there held that both constitutional and prudential requirements for standing were satisfied. After considering the decisions in *Riegle* v. *FOMC*, 656 F.2d 873 (D.C. Cir. 1981), and *Committee for Monetary Reform* v. *Board of Governors*, 766 F.2d 538 (D.C. Cir. 1985), the Court concluded that equitable discretion could not appropriately be applied to deny Senator Melcher standing, inasmuch as no private plaintiff is available to enforce the Appointments Clause. The Court also denied the government's application for a stay, and in a per curiam order dated June 24, 1986, the Court of Appeals denied the government's petition for a writ of mandamus and dismissed its emergency motion for a stay as moot.

> The most important of these methods, open market trading—*i.e.*, the purchase and sale of Government securities in the domestic market—is exclusively the function of the FOMC. The Committee is composed of twelve members: the seven members of the Board of Governors of the Federal Reserve System, who are appointed by the President with the advice and consent of the Senate, and five representatives of the Federal Reserve Banks, who are elected annually by the boards of directors of the Banks from among the Banks' presidents and first vice presidents. The Federal Reserve Banks are private corporations whose stock is owned by the member commercial banks within their districts. The board of directors of each Reserve Bank consists of six members elected by the member commercial banks and three members appointed by the Board of Governors of the Federal Reserve System. The presidents and five vice presidents of the Reserve Banks are selected by the respective boards of directors but are subject to approval, suspension and removal by the Board of Governors. In short, the FOMC consists of seven members who hold their offices by virtue of presidential appointments confirmed by the Senate, and five members who are elected by Reserve Bank boards of directors, and who hold their offices subject to the approval of the Board of Governors.

Committee for Monetary Reform v. *Board of Governors of the Federal Reserve System*, 766 F.2d 538, 539-40 (D.C. Cir. 1985) (footnotes omitted).

It is the presence on the FOMC of the five members who are elected by Reserve Bank boards of directors [3]

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[3] One Reserve Bank member of the FOMC is selected by the Boston, Philadelphia and Richmond banks; one by the Cleveland and Chicago banks; one by the Atlanta, Dallas and St. Louis banks; one by the Minneapolis, Kansas City, and San Francisco banks; and one by the New York bank.

that is at issue in this lawsuit. These five individuals are full voting members of the Committee, and as such they play an important role in the decisions of that body, including decisions aimed at regulating the nation's money supply. Plaintiff contends that public policy decisions of this kind may be made only by officials appointed by the President and confirmed by the Senate, in conformity with the Constitution's Appointments Clause. Accordingly, he asks the Court to declare section 263(a) unconstitutional and to enjoin the Reserve Bank members who have been selected pursuant to that section from voting or otherwise participating in the Committee's operations.

II

The Appointments Clause provides that

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Constitution, Article II, § 2, cl. 2. Thus,

> [a]n officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution.

United States v. *Smith*, 124 U.S. 525, 532 (1888) (*relying on United States* v. *Mouat*, 124 U.S. 303 (1888), and

United States v. *Germaine*, 99 U.S. 508 (1878)). Upon a review of the governing statute and of the applicable constitutional provisions, the Court has concluded, for the reasons discussed below, that the Reserve Bank members of the Federal Open Market Committee are not "Officers of the United States."

It is clear that the defendants were not appointed by the President. The question that arises next is whether, as the government contends, the defendants qualify under the method prescribed by the Appointments Clause for "inferior officers," that is, appointment by the heads of departments.[4]

The government argues that, since the Federal Reserve's Board of Governors has the power to approve, dismiss, and fix the compensation [5] of the Presidents and First Vice-Presidents of the various Reserve Banks,[6] the Reserve Bank members of the FOMC are under the effective control of the Board members, who unquestionably are principal officers of the United States, appointed by the President and confirmed by the Senate. 12 U.S.C. § 241.[7] It follows, the government maintains, that these

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[4] Obviously, the defendants were not appointed by any court of law.

[5] Additional authority solely vested in the Board which the government cites to support its argument include the powers to enforce civil penalties against member banks, to issue orders enjoining member banks from engaging in unsound practices, and to suspend or remove directors or officers of member banks.

[6] 12 U.S.C. §§ 248(f), 341. Only Presidents and First Vice-Presidents of the several Reserve Banks are eligible for appointment to the FOMC. 12 U.S.C. § 263(a).

[7] Accordingly, the government reasons, the Board members are equivalent to heads of departments, within the meaning of Article II, § 2. There is authority for the proposition that persons whose appointments must, by statute, be approved by the head of a department, are officers of the United States. *United States* v. *Hartwell*, 73 U.S. 385, 393-94 (1967). *See United States* v. *Smith*, *supra*,

members need not be nominated by the President and confirmed by the Senate. That argument is fallacious for several reasons.

First. It would be a distortion of language to label as "inferior officers" members of a body vested with the vast powers possessed by the Federal Open Market Committee. *Cf. McGrath* v. *United States*, 275 F.2d 294 (2d Cir. 1921) (income tax inspectors appointed by the Commissioner of Internal Revenue are inferior officers); *United States* v. *McCrory*, 91 F.2d 295 (5th Cir. 1899) (letter carriers appointed by the postmaster general are inferior officers); *Chaplains for Army Hospitals*, 10 Op. Atty. Gen. 449 (1863) (chaplains of Army hospitals are inferior officers).

Second. The Reserve Bank FOMC members were not appointed by the Federal Reserve's Board of Governors but by the private Reserve banks in different parts of the country. For that reason, even if the members of the Board of Governors could collectively be analogized to the head of a government department, the "inferior officer" argument would not be materially strengthened.

Third. The Reserve Bank members sit on the FOMC with the Governors themselves, with the same opportunity to participate and vote as the Governors. *See generally*, 12 U.S.C. § 263(a); 12 C.F.R. § 272. The statutes governing the FOMC contain no suggestion that the Governors may supervise or otherwise influence the policy choices of the Reserve Bank members. Similarly, not even a hint of a suggestion exists that the power of the Board of Governors to remove officers of the Federal Reserve Banks was meant to be used by the Board to in-

124 U.S. at 532. In other cases, the courts have been reluctant to treat government employees as constitutional officers when they were not actually selected by the President, a department head, or a court. *See United States* v. *Smith*, *supra*, 124 U.S. at 525; *United States* v. *Mouat*, *supra*, 124 U.S. at 303; and *United States* v. *Germaine*, 99 U.S. 508 (1878).

fluence the votes of those officers who sit with them as members of the FOMC. To the contrary, the power of removal granted by 12 U.S.C. § 248(f) was to facilitate only the suspension or removal of Federal Reserve Bank officers for cause, a mechanism undoubtedly meant to encompass such infractions as misfeasance in office, but not a policy disagreement.

A holding that Reserve Bank members of the FOMC are inferior officers appointed by the Board of Governors thus would be at odds with the Committee's statutory mandate, its tradition of operation, and the plain language of Article II, § 2, cl. 2. For these reasons, the Court concludes that the Reserve Bank members of the FOMC are not "inferior officers" under the control of the governmental members of that body.

If the Reserve Board members of the Federal Open Market Committee are appointed neither by the President nor as "inferior officers" by someone having the authority to appoint such officers, they can validly sit on the Federal Open Market Committee only if membership thereon may constitutionally be granted to individuals other than officers of the United States, *i.e.*, to private individuals selected by the Reserve banks. The Court now turns to that question.

III

The issue whether private Reserve Board officers may validly be members of the FOMC turns upon whether the type of decisionmaking in which that body engages must constitutionally be performed by a government officials, or whether, to the contrary, it may validly be performed, at least in part, by otherwise private individuals. Framed in these terms, it is apparent that the decisions primarily relied upon by the parties are only marginally, if at all, relevant to this lawsuit.

The cases principally cited—*Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), and *Buckley* v. *Valeo*, 424 U.S. 1

(1976)—dealt with congressional attempts to delegate executive powers to officers who were, in one fashion or another, beholden to the Congress. The Supreme Court, intent upon preserving the constitutional separation of powers imposed on the executive and legislative branches by the Founding Fathers, struck down what it regarded as congressional attempts to enlarge the legislative authority at the expense of that of the Executive Branch.

Here, by contrast, Congress has not sought to enhance its own power or to transgress the separation of powers. Instead, both it and the President [8] have in part committed open market trading (and thus indirectly a measure of the nation's monetary policymaking) to private individuals not appointed by or beholden to either branch of government. The issue thus presented—whether Congress has the constitutional power to commit Article I responsibilities to persons who are not officers of the United States [9]—appears to be one of first impression.[10]

When considering the constitutionality of a statute duly enacted by the Congress, the Court is obligated to move cautiously, and to avoid a declaration of invalidity if it is possible to do so. *See generally United States Civil Service Commission* v. *National Association of Let-*

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[8] President Franklin D. Roosevelt signed the 1935 statute, discussed *infra*.

[9] It could of course alternatively be argued that Article I functions are not at all implicated: that the purchase and sale of government securities is a private activity having no significant relationship to governmental responsibilities. However, it would be to blind oneself to the obvious to disregard the fact that the FOMC's open market activities are designed under law to expand and contract the nation's money supply for significant public purposes.

[10] However, in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 139, the Supreme Court noted that when a function is "sufficiently removed" from the administration and enforcement of the public law, the person performing it need not be an officer of the United States. *See also* note 26, *infra*.

ter Carriers, 413 U.S. 548, 571 (1973); *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971); *Gomillon* v. *Lightfoot*, 364 U.S. 339, 343-44 (1960); *Davis* v. *Bandemer*, No. 84-1244 (U.S. June 30, 1986) slip op. at 2 (O'Connor, J., concurring). It is with that principle in mind that the Court examines the issue here.

The textual source for plaintiff's claim that only officers of the United States may properly set monetary policy, let alone that only such officers may purchase or sell securities, is not obvious.[11] The Appointments Clause governs the selection of public officers—it says nothing about the exercise of public power by private persons. Nor has the Court's attention been drawn to any other provision of the Constitution that defines what may and what may not be left or delegated, in whole or in part, to private persons or entities. Hence, the Court is "dealing with claims under broad provisions of the Constitution," *Davis* v. *Bandemer*, *supra*, slip op. at 2 (O'Connor, J., concurring), where a judicial invalidation of Congress' legislative judgment must be grounded in a firm conviction that the Constitution's limitations have been transgressed. That conviction is not present here. In addition to the absence of precise textual authority for plaintiff's position, there are the lessons of history which militate strongly against a conclusion that would rigidly exclude the private members from the FOMC.

IV

Ever since the birth of this nation, the regulation of the nation's monetary systems has been governed by a

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[11] As discussed below, plaintiff relies on Article I, section 8, clause 5 of the Constitution (coinage of money and regulation of its value) as authority for the congressional power to regulate the open market trading engaged in by the Federal Open Market Committee. However, such reliance does not answer the question whether non-governmental individuals may be used to execute the open market trading activities.

subtle and conscious balance of public and private elements.

The First Bank of the United States, chartered in 1791,[12] was engaged in monetary policy (principally by demanding payments in specie from state banks or failing to press for such payment). Interestingly, while the Bank was to have an authorized capital stock of $10 million, the government was allowed to subscribe only one-fifth of that amount. Since the Bank's directors were elected by the stockholders, the leadership of the First Bank, much like that of the present-day FOMC, was chosen by both public and private interests, but with respect to the First Bank the private interests had a 4-1 majority.

The Second Bank of the United States—which exercised powers similar to those of the First[13]—continued under the law[14] with a mixed system of control. Five of its 25 directors were appointed by the President, by and with the advice and consent of the Senate. The remaining 20 directors were elected annually at the banking house in Philadelphia by the qualified stockholders of the corporation. A proposal to limit the choice of the Bank's president to one of the directors appointed by the President

[12] Act of February 25, 1791, 1 Stat. 191 ff. The bill to establish the First Bank was proposed by Alexander Hamilton who was emphatic in suggesting that it should be under private direction albeit with some governmental involvement. See Report of the Secretary of the Treasury to the House of Representatives (Dec. 14, 1790), reprinted in 3 *The Works of Alexander Hamilton* 388, 427-31 (H. Lodge ed. 1903).

[13] The Bank also exercised such monetary policymaking responsibilities as the manipulation of regional currency transfers and the sale and purchase of foreign issues. Redlick, *The Molding of American Banking* 132-34 (1957); *see generally* Hammond, *Banks and Politics in America from the Revolution to the Civil War* (1957).

[14] Act of April 10, 1816, 3 Stat. 266 ff.

was defeated in Congress.[15] Although the manner of the selection of the bank's directors was not directly in issue, the fact is that the Bank survived a broad constitutional challenge in *McCulloch* v. *Maryland*, 17 U.S. 316 (1819).

The charter of the Second Bank expired in 1836 and was not renewed. Various methods for dealing with national financial and monetary problems were employed during the next seventy-five years, including the establishment of an Independent Treasury System and the enactment of the so-called National Bank Act,[16] but the nation experienced repeated financial crises and consequently there was considerable agitation in favor of a more stable central system. Eventually new ideas and measures evolved, leading to the creation of the Federal Reserve System in 1913. However, the activities now vested in the FOMC—the sale and purchase of government securities to affect the money supply—were still not committed to any governmental official or body. To the contrary, in 1922 the private Reserve Banks created their own committee to coordinate their respective open market activities, and that is what the committee undertook to do.[17]

In the Banking Act of 1933,[18] Congress for the first time formally took cognizance of open market trading as such, creating a predecessor of the FOMC that, again, unlike the present Committee, included *only* Reserve Bank members.[19] Finally, in 1935, the FOMC was constituted in

[15] Debates and Proceedings in the Congress of the United States, 14th Cong., 1st Sess., pp. 1151-52.

[16] 12 Stat. 637.

[17] Burgess, *The Reserve Banks and the Money Market* 240 (1946). The following year, a federal open market investment committee established by the Federal Reserve Board was organized to make recommendations to the individual Reserve Banks.

[18] 48 Stat. 162.

[19] The powers of the Federal Open Market Committee as established by the 1933 act were only advisory in nature.

its present form and with substantially [20] its present authority. While at that time some Members of Congress favored complete control of the Committee by the Board of Governors of the Federal Reserve Board, others sought to continue the then existing arrangement of private dominance. The present structure represents a compromise reached by legislators after airing "bitter differences." [21]

V

Senator Melcher asks the Court to upset this deliberate, time-honored balance. He relies substantively upon Article I, § 8, cl. 5 of the Constitution, which empowers Congress to "coin money" and to "regulate the value thereof," suggesting that only public officials nominated by the President and confirmed by the Senate may carry out or participate in the carrying out of those responsibilities. The Court will assume, without deciding, that the open market trading activities of the FOMC fall within the scope of section 8, cl. 5. Even if that assumption is correct, however, it only establishes that Congress *may*, if it so elects, commit open market trading to an officer or officers of the Executive Branch. The Constitution does not, in terms, *require* Congress to do so.[22]

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[20] In 1942, when attempts had been made to elect officers of commercial banks as representatives of the Reserve Bank on the FOMC, an amendment was adopted providing that only presidents or first vice presidents of Reserve Banks could be members of the FOMC. 12 U.S.C. § 263(a).

[21] *See* 79 Cong. Rec. 11778 (1935) (remarks of Senator Glass, Chairman of the Senate Banking Committee). Chairman Steagall of the House Banking Committee noted that although the House had earlier expressed itself in favor of complete governmental control of open-market operations, the compromise was acceptable to him. 79 Cong. Rec. 13705-06 (1935).

[22] As *McCulloch* v. *Maryland*, *supra*, teaches, Congress may select "any appropriate means" to carry out functions legitimately vested in the federal government. 17 U.S. at 409.

The broader issue, therefore, is whether under the Constitution, Congress may permit open market trading as an element of monetary policy to be exercised by private persons, or whether it is restricted in that regard to a grant of authority to government officials. In the opinion of this Court, Congress may validly leave dormant, or leave or delegate to private persons, at least some of its Article I, section 8, powers,[23] including the power to take measures to affect the supply of money.

This holding is necessarily narrow: the Court is not called upon to decide, and it does not decide, which of the powers entrusted to Congress by Article I, section 8, of the Constitution other than those directly implicated here may be delegated to private individuals. Indeed, many responsibilities may be so intrinsically governmental in nature that they may not be entrusted to a nongovernmental entity.[24] Other responsibilities, unlike the functions at issue here, lack a history of private participation, and that fact may well make a significant difference in terms of any attempted delegation to individuals who are not officers of the government.[25] Finally, it is not necessary to decide, and the Court does not decide, whether Congress could at this time give to private per-

[23] Congress has of course with some frequency exercised its power with respect to interstate commerce and other subjects to establish governmental agencies, only to abandon the effort later when it appeared to be no longer substantively or politically expedient, leaving the area thus vacated to state or private control or to no control. *E.g.*, National Recovery Administration (abolished by EO 7252 of December 21, 1935); Office of Alien Property (abolished by EO 11281 of May 13, 1966); Price Commission of the Economic Stabilization Program (abolished by EO 11695 of January 11, 1973).

[24] *E.g.*, the powers to conduct foreign affairs or to establish military and naval forces.

[25] As Justice Holmes has aptly observed, "[t]he life of the law has not been logic; it has been experience." Holmes, *The Common Law* 1.

sons the decisive voice with respect to such responsibilities as the money-management functions involved here.[26]

What is apparent is that the sale and purchase of government securities, like the sale and purchase of other financial instruments, can, as a practical matter, be performed by private individuals, and that it was so performed without direct government supervision or involvement for many years prior to 1935. To be sure, open market trading now has a profound impact on the nation's economic health; but that can also be said of other activities that are performed by private entities in whole or in part. In short, plaintiff has failed to offer any cogent reason why Congress may not establish or continue a partnership of public and private control over these functions[27] in lieu of execution of these responsibilities exclusively by government officials.[28]

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[26] As noted, seven of the twelve members of the FOMC are government officials, and the Board of Governors of the Federal Reserve Board has effective control over monetary policy, not the FOMC. *See* 12 U.S.C. §§ 341, 348(f), 241(fifth); 307. Moreover, as the Court of Appeals has said, the FOMC "in no way exercise[s] direct governmental authority." *Committee for Monetary Reform* v. *Board of Governors*, *supra*, 766 F.2d at 543-44. For example, it adjudicates no rights; it brings no lawsuits to enforce the law; and it does not direct the conduct of anyone other than its own members.

[27] Public-private partnerships are not uncommon, having been employed in connection with such functions as mass transit (Amtrak), communications (Comsat), mortgage insurance (Federal National Mortgage Association) and assistance to members of the armed forces (American Red Cross). *See Irwin Memorial Blood Bank* v. *American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981).

[28] The decision in *FOMC* v. *Merrill*, 443 U.S. 340 (1979), to the effect that the Committee is an "agency" for Freedom of Information Act purposes is of course not conclusive with respect to the issue before the Court. *See Irwin Memorial Blood Bank* v. *American Red Cross*, *supra*, 640 F.2d at 1052; *Warren* v. *Government*

VI

Congress has employed its undoubted power to regulate the banking industry and the nation's money supply by a system that is in part private although it also includes significant avenues for decisive governmental influence. Few issues in the history of this nation have been as thoroughly considered and debated as central banking and the regulation of the money supply, and private participation, or even control, have been hallmarks of what was from time to time prescribed by the Congress. The current system is also the product of an unusual degree of debate and reflection within the Legislative Branch, with the participation from time to time of the Executive, and it represents an exquisitely balanced approach to an extremely difficult problem. To be sure, this background would not save the legislation if it clearly contravened the Constitution.[29] But the Court concludes on the basis of its consideration of all the factors discussed above, that, while the composition of the Federal Open Market Committee may be unusual, it is not unconstitutional.

The government's motion for summary judgment will be granted, and this action will be dismissed. An appropriate order accompanies this Opinion.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

September 25, 1986

National Mortgage Association, 611 F.2d 1229 (8th Cir. 1980); *Dixson* v. *United States*, 465 U.S. 482, 498 (1984).

[29] *See Bowsher* v. *Synar*, *supra*; *Chadha* v. *INS*, 462 U.S. 919 (1983).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed Sept. 25, 1986]

ORDER

In accordance with the Opinion issued contemporaneously herewith, it is this 25th day of September, 1986

ORDERED that plaintiff's motion for summary judgment be and it is hereby denied; and it is further

ORDERED that defendants' motion for summary judgment be and it is hereby granted; and it is further

ORDERED that this action be and it is hereby dismissed.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-1335

JOHN MELCHER,

Plaintiff,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Defendants.

[Filed Nov. 18, 1986]

ORDER

Upon consideration of plaintiff's motion to alter or amend the judgment entered in this action on September 25, 1986, the opposition thereto, and the entire record herein, it is this 17th day of November, 1986

ORDERED that plaintiff's motion to alter or amend the judgment of September 25, 1986 be and it is hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5692

JOHN MELCHER, Honorable Member
United States Senate,
Appellant

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*

[Filed Dec. 18, 1987]

Appeal from the United States District Court
for the District of Columbia

Before: EDWARDS, STARR and D. H. GINSBURG, *Circuit Judges.*

JUDGMENT

This cause came on to be heard upon the record and briefs of the parties and was argued by counsel. Upon consideration of the foregoing, it is

ORDERED and ADJUDGED, by the Court, that the opinion of the district court is vacated and the judgment of the district court on appeal herein is affirmed, in ac-

cordance with the Opinion of the Court filed herein this date.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: December 18, 1987

Opinion for the Court filed by Circuit Judge Starr.

Concurring Opinion filed by Circuit Judge Edwards.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5692

JOHN MELCHER, HONORABLE MEMBER,
UNITED STATES SENATE,
Appellant

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*

[Filed Mar. 4, 1988]

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5692

JOHN MELCHER, HONORABLE MEMBER,
UNITED STATES SENATE,
Appellant

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*

[Filed Mar. 4, 1988]

Before: EDWARDS, STARR and D. H. GINSBURG, *Circuit Judges*

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed February 1, 1988, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
Deputy Clerk